STATE OF MICHIGAN

COURT OF APPEALS

CHRISTINE A. ECKER, Plaintiff-Appellee, v PATRICK J. ECKER, Defendant-Appellee.	UNPUBLISHED May 10, 2011 No. 301244 St. Clair Circuit Court LC No. 03-002501

Before: WILDER, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right from the circuit court's order awarding sole legal and physical custody of the parties' two minor daughters, M.E.[1] and H.E.[2], to plaintiff. We affirm.

I. FACTS

The trial court's opinion below included a concise statement of the underlying facts:

> This matter is before the court on [] plaintiff's motion for a change in custody. The parties were divorced by Judgment dated June 3, 2004. As a result of the Judgment of Divorce the parties were granted joint legal and joint physical custody of their two minor children . . . . [T]he parties shared time with the children on an irregular basis from the date of the Judgment of Divorce until about 2007 when[,] after a visit with the two children and [] defendant at [] defendant's then home in Petoskey, Michigan [] defendant did not return the children to [] plaintiff. At some point the minor child [H.E.] asked to go back to [] plaintiff and [] defendant drove her back to be with her mother and kept [M.E.] with him.

[1] Born on January 24, 1999.

[2] Born on November 13, 2000.

> [P]laintiff did not follow through with enforcement of the denial of her parenting time with [M.E.] and [] defendant did not seek further parenting time with [H.E.] Thus for the last approximate three years the minor children have lived apart from one another and neither saw the other parent to any extent. [P]laintiff testified that she was able to see [M.E.] a few times but was generally unable to get [] defendant to agree that [M.E.] visit with her unless she drove to northern Michigan for a day visit. [D]efendant did not seek contact with [H.E.] during this time and even after [] plaintiff filed this motion and was in the Port Huron area for a Friend of Court investigation, [defendant] did not seek contact with [H.E.]
>
> [P]laintiff filed this motion September 21, 2009; a Friend of Court investigation and recommendation was completed on March 23, 2010 and hearing on the motion began June 23, 2010 and was completed on October 8, 2010.

The trial court noted that "each child lived solely with one parent with little contact with the other parent," and each would thus "naturally look to the only parent that child had contact with as the source of emotional and material support and discipline." Accordingly, the trial court held that each child had an established custodial environment with the parent with whom that child had been residing. This aspect of the judgment below is not in dispute, and therefore, the parties were required to show by clear and convincing evidence that any change in the established custodial environment of the children was in the best interest of the children. *Brown v Loveman*, 260 Mich App 576, 585; 680 NW2d 432 (2004).

The trial court applied the statutory best-interests factors, MCL 722.23, and concluded that clear and convincing evidence showed that it was in the best interests of both children to award sole legal and physical custody to plaintiff. Therefore, the trial court ordered that M.E. join the H.E. under defendant's custody. This appeal followed.

II. BEST-INTERESTS FACTORS

All custody orders must be affirmed on appeal unless the trial court's factual findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. MCL 722.28; *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994).

The best interests of the children must be determined through a weighing and balancing of the factors enumerated in MCL 722.23:

> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
>
> (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and

permitted under the laws of the state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute.

In this case, the trial court concluded that H.E. had an established custodial environment with plaintiff. Defendant did not seek to change that in the trial court, and has raised no such issue on appeal. Therefore, for purposes of this appeal, we need review only the best-interests analysis relating to M.E.

The trial court gave plaintiff the advantage in connection with all the statutory factors, but for rating the parties equal under factor (e), and declining to state which, if either, party had an advantage as the result of the court's interviews with the children in connection with factor (i).[3] Defendant asserts that the court's conclusions in connection with each factor where the court gave plaintiff the advantage was contrary to the great weight of the evidence. We disagree.

[3] "The trial court need not violate the child's confidence by revealing that preference on the record." *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 458; 705 NW2d 144 (2005).

A. MCL 722.23(a) (emotional ties)

The trial court found that this factor "slightly" favored plaintiff. In so concluding, the trial court noted that plaintiff had had little physical contact with M.E., but credited plaintiff's testimony that this was not for lack of trying, but rather, defendant frequently changed residence and telephone number without notice, and often failed to return calls. The court additionally credited testimony from plaintiff and a school counselor, who testified that M.E wished to call plaintiff from her school because defendant refused to allow her to do so from home. The court further noted that, according to the counselor, M.E was suffering for want of contact with plaintiff but, when M.E. told defendant she wanted contact, he flatly disallowed it. Defendant also threatened the school counselor who had attempted to facilitate contact between plaintiff and M.E. On the other hand, according to the school counselor, plaintiff showed an interest in M.E.'s schooling activities, even though it was from a distance. The court concluded that, even though plaintiff did not exercise her ability to enforce her parenting time until this action was filed, "she does appear to be concerned with and love [M.E.]" By contrast, "defendant's absolute refusal to allow the child contact with her mother indicates that he is not concerned with how this might affect her emotionally."

Defendant does not dispute the evidentiary bases for the court's conclusions concerning his interference with plaintiff's and M.E's desires for contact with each other, but instead, emphasizes that M.E had resided with defendant as her sole caretaker over a period of four years during which she rarely saw plaintiff.

Indeed, factor (a) concerns the existence of emotional ties, not the reasons why such ties may not be whey they should be. The trial court reasonably found relevant defendant's "absolute refusal to allow the child contact with her mother," noting that defendant's record in this regard shows a lack of concern with how that interference would affect M.E. emotionally. In short, plaintiff's efforts to maintain ties supports the conclusion that ties existed that plaintiff and the child in question wanted to exercise, while defendant's interference showed a lack of concern on his part regarding a matter of importance to his daughter. The trial court's conclusion for this factor was thus not contrary to the great weight of the evidence.

B. MCL 722.23(b) (capacity to give love, affection and guidance)

The trial court found that this factor favored plaintiff, noting that defendant removed M.E. from remedial educational services despite the fact that M.E. was 12 years old but was still reading at a second grade level. The court also cited defendant's questionable disciplinary practice of forcing M.E to "wall sit," meaning to assume a seated position with no chair but with her back against a wall, as well as evidence that defendant's wife had slapped M.E. in the face with force sufficient to leave a hand-shaped bruise. Finally, the court referenced the Friend of the Court [FOC] investigator's report, which indicated that both defendant and his wife referred to M.E. as "a liar, lazy and manipulative," in response to M.E.'s comments to teachers about what occurred in her home, as well as her inability to perform in school.

Defendant protests that he testified that he did not arbitrarily pull M.E. from special education, but rather, he had her evaluated and was informed that she tested well, and he was never advised that she should not be in the mainstream curriculum. Defendant asks this Court to

credit his alternative attempt to establish a framework for helping the child succeed in the educational mainstream. However, it is not this Court's purpose to entertain plausible alternative interpretations of the evidence presented; the test is whether the trial court's finding was against the great weight of the evidence, MCL 722.28; *Fletcher*, 447 Mich at 876-877. In this case, the FOC investigator testified that M.E. had severe learning disabilities, thus supporting the trial court's conclusion that defendant's actions in removing M.E. from special education showed that he lacked the capacity to provide guidance.

Similarly, regarding the "wall sit" method of discipline, the trial court could reasonably conclude that it showed a lack of capacity to give love, affection and guidance, to force a child to endure a sitting posture without support from below. The court was not obliged to credit defendant's mitigating testimony concerning how benign that state of physical distress was or how briefly he resorted to such discipline. See *Sloan v Kramer-Orloff Co*, 371 Mich 403, 412; 124 NW2d 255 (1963) (an appellate court "must . . . leave the test of credibility where our system reposed it—in the trier of the facts"). The trial court was likewise not obliged to doubt the account of the child's having suffered a slap from defendant's wife that left a lasting hand-shaped impression on her face, nor was it required to discount defendant's and his wife's statements that M.E. was "a liar, lazy, and manipulative." *Id.*

Finally, although defendant additionally argues that plaintiff demonstrated a lack of capacity to provide love and guidance for having failed to do so for over four years, this factor concerns capacity, not recent history. As discussed in Part II-A, the trial court reasonably found that any deficiencies on plaintiff's part were the direct result of defendant's efforts to block the mother-daughter relationship. For all of these reasons, the trial court's conclusion that factor (b) favored plaintiff is not against the great weight of the evidence.

C. MCL 722.23(c) (capacity to provide necessities)

The trial court found that the parties had equal capacity to provide for the child, but that plaintiff nonetheless had the advantage in light of defendant's "demonstrated . . . refusal to allow [the child] to participate in special education services and the school breakfast program." Defendant argues that he has greater income and thus is better financially able to support the child than is plaintiff. Nevertheless, "a parent with more modest economic resources is . . . entitled to equal consideration in the child custody context." *Corporan v Henton*, 282 Mich App. 599, 607; 766 NW2d 903 (2009). Defendant also takes issue with the trial court's conclusion that the child came to school hungry by pointing to his and his wife's testimony that the girl ate breakfast at home, and by providing a benign explanation for why she was not allowed in the school cafeteria. Again, however, credibility is for the fact-finder to ascertain. *Sloan*, 371 Mich at 412. Therefore, defendant cannot show that the trial court's conclusion that factor (c) favored plaintiff was against the great weight of the evidence.

D. MCL 722.23(d) (stability of environment and desirability of continuity)

In finding that this factor favored plaintiff, the trial court noted that defendant had frequently changed residences and defendant's wife knew nothing of any friends of M.E. The trial court concluded that the child "is not living in a stable environment." The trial court

additionally noted that plaintiff had moved several times as well, but had been in one place "for a significant time" such that H.E. had never had to change schools.

Defendant protests that M.E. has "lived in a loving and stable environment with [him] for over four years." Defendant, however, testified that he had lived at his current address for not quite two years, and on appeal, does not dispute the trial court's finding that he moved frequently before that. In our view, the bases offered by the trial court are sufficient to avoid the conclusion that the court's finding for this factor was contrary to the great weight of the evidence.

E. MCL 722.23(f) (moral fitness)

The trial court found that this factor favored plaintiff on the grounds that defendant's history included an arrest for being drunk and disorderly, and that a psychological assessment attendant to a disability claim "indicated a history of alcohol dependence and polysubstance abuse."

Defendant does not dispute that a failure to get an alcohol problem under control bears on the question of moral fitness, *McIntosh v McIntosh*, 282 Mich App 471, 480; 768 NW2d 325 (2009), but protests that the drunk and disorderly incident was four years old, and the psychological report in question indicated "alcohol dependency attributes," not outright alcoholism. The second assertion is predicated on a questionable premise, i.e., that the assessment referred to "alcohol dependency attributes." The report itself was never admitted into evidence,[4] and the FOC investigator who reviewed the assessment testified that "a psychological report on [defendant] indicated an alcohol dependence issue." We note, however, that in her report to the court she did use the phrase "substance dependence attributes" in the context of factor (g). Assuming that the psychological assessment actually did use such a phrase, evidence of alcohol-dependency "attributes" can be perceived as evidencing alcohol dependency. As commonly understood, "attributes" is interchangeable with the concept of diagnostic "criteria," a prevalent feature of psychological diagnostics. See DSM-IV-TR. Regardless, "a drinking problem is a type of conduct that bears on how one functions as a parent, which can be considered under the moral fitness factor." *Id.* Thus, the combination of alcohol dependence (or of continuing alcohol-dependency attributes) and a drunk-and-disorderly incident four years earlier supports the trial court's conclusion that defendant had a problem in this regard, and thus that plaintiff had the advantage in moral fitness.

F. MCL 722.23(g) (mental and physical health)

The trial court stated that the above-referenced psychological assessment indicated that defendant had impaired intellectual functioning, substance-abuse attributes, and dysfunctional personality characteristics, and further noted that defendant suffered from some hearing loss and

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[4] Nevertheless, "trial courts may consider psychological evaluations, and, at their discretion, afford them the weight they deem appropriate in accord with the Michigan Rules of Evidence . . . ." *McIntosh*, 282 Mich App at 475.

walked with a cane throughout the evidentiary hearing. The court concluded that "defendant's limitations may have a negative impact on his ability" to parent M.E. The court also noted that plaintiff had a degenerative disc disease, but that plaintiff nonetheless appeared to attend well to the H.E.'s needs.

In arguing that this factor favored neither party, defendant protests that "one need not be a rocket scientist to be a good parent!", and complains that the court used information in an assessment that was never put into evidence.

While it is true that the report was not admitted into evidence, the FOC investigator testified at the evidentiary hearing that the report indicated that there were concerns with defendant's ability to care for M.E. Although defense counsel conducted a thorough cross-examination of the investigator, he chose not question her on this specific issue. Defense counsel did, however, elicit an opinion from the investigator that defendant had "an anger management issue," and, based on a phone call wherein defendant was yelling and swearing at her, the investigator concluded that there was "concern regarding [defendant's] ability to deal with professionals regarding his child." Therefore, the court's concern that defendant's limitations hampered his parenting ability, and thus put him at a disadvantage in relation to plaintiff, was not against the great weight of the evidence.

G. MCL 722.23(h) (home, school, and community record)

The trial court explained its finding that this factor favored plaintiff by referring generally to its findings in connection with previously considered factors. Defendant on appeal likewise refers generally to his "discussion above" in asserting that the court erred in finding for plaintiff under this factor.

> With respect to the best interests factors, the finder of fact must state his or her factual findings and conclusions under each best interest factor. These findings and conclusions need not include consideration of every piece of evidence entered and argument raised by the parties. However, *the record must be sufficient for this Court to determine whether the evidence clearly preponderates against the trial court's findings*. [*In re A.P*, 283 Mich App 574, 605; 770 NW2d 403 (2009), quoting *McIntyre v McIntyre (On Remand)*, 267 Mich App 449, 452, 705 NW2d 144 (2005) (citations omitted) (emphasis added).]

In this case, while the trial court erred in not stating specific findings under factor (h), the court's findings for the above discussed factors (a), (b), (c), and (d) referenced the home, school, and community record of M.E., notably, defendant's "demonstrated . . . refusal to allow [M.E.] to participate in special education services," to address her below-grade reading level. Therefore, for the reasons stated above, the court did not err in concluding that factor (h) favored plaintiff. See *Dailey v Kloenhamer*, __ Mich App __; __ NW2d __ (Docket No. 300698, Issued March 8, 2011), slip op at 5 (The trial court's finding that factor (h) favored the plaintiff was not against the great weight of the evidence, where, despite plaintiff's belief that the minor child was not sufficiently challenged in school, "plaintiff had not enrolled the child in summer enrichment programs, nor had she met with the child's teachers to discuss her concerns.")

H. MCL 722.23(j) (willingness and ability to facilitate relationship with other parent)

In finding that this factor favored plaintiff, the trial court noted that "neither party has done much to facilitate a relationship between the child in their care and the other parent," but emphasized that defendant had taken active steps to prevent M.E. from having contact with plaintiff, including becoming irate with a school employee for allowing M.E. to speak to plaintiff on the telephone.

In challenging the court's conclusion, defendant emphasizes evidence that plaintiff has also not always been entirely cooperative with regard to making parenting-time arrangements with defendant. But defendant points to no behavior on plaintiff's part equivalent to defendant flatly forbidding M.E. to have contact with her mother, and even showing anger at a school official who facilitated such contact. The court's conclusion for this factor was not contrary to the great weight of the evidence.

I. MCL 722.23(k) (domestic violence)

In giving plaintiff the advantage for this factor, the trial court summarized ambivalent evidence concerning domestic violence between the parties, and noted the lack of evidence of any domestic violence in connection with any current relationship involving the parties. Nevertheless, the trial court stated that "[t]here is evidence . . . of inappropriate discipline . . . in the defendant's home both regarding the "wall sit" issue as well as the hand slap to [the subject child's] face by his now wife." Defendant protests that "wall sit is a form of discipline—it does not in any way involve hitting or striking the child." We conclude that the trial court could reasonably regard forcing a child into a taxing and uncomfortable physical position as an act of violence, even if a mild one. And, again, there was evidence that, on one occasion, defendant's wife had slapped the child hard enough on the face to leave a hand-shaped bruise. For these reasons, defendant fails to show that the trial court's conclusion for this factor was contrary to the great weight of the evidence.

J. MCL 722.23(l) (any other consideration)

The trial court did not expressly state that this factor favored plaintiff, but this was the court's obvious conclusion, given its discussion of defendant's display of indifference, then hostility, when defendant missed a scheduled interview by the FOC with M.E., yet became belligerent when the FOC's agent called to reschedule. The trial court likened this to defendant's hostile response upon learning that M.E.'s school counselor allowed the child to call her mother from her office. The trial court additionally reiterated its concerns about defendant removing the child from special education, and sending her to school hungry while disallowing her participation in the school breakfast program. The court further noted that the M.E. had no friends who ever visited her home with defendant. The court concluded that this "indicates an atmosphere wherein the defendant does not want anyone to know what takes place in his home regarding [M.E.] and further indicate[s] the defendant's lack of capacity to properly care for" her.

Defendant only attempts a relatively benign explanation for his irate phone conversation with the FOC specialist, stating that defendant "admitted getting upset . . . as he felt he was made

to look bad for something that was not his fault." This argument cannot support the conclusion that the trial court's decision for this factor is against the great weight of the evidence.

III. CONCLUSION

For these reasons, we conclude that defendant has failed to show that any of the trial court's findings under the statutory best-interests factors were against the great weight of the evidence. We therefore affirm the trial court's conclusion that there was clear and convincing evidence that M.E.'s interests were best served by granting plaintiff sole legal and physical custody.

Affirmed.

/s/ Kurtis T. Wilder
/s/ William C. Whitbeck
/s/ Karen M. Fort Hood